HSS INTEGRATED SDN BHD

v.

LEOW YEW ONN

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[ORIGINATING SUMMONS NO: R1-24-74-2000]
28 DECEMBER 2001

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for leave - Decision of Industrial Court - Whether findings of Industrial Court perverse - Whether learned chairman erred in law or fact - Whether learned chairman had acted in excess of jurisdiction*

This was an *ex parte* application by the applicant company for leave to apply for an order of *certiorari* to quash the Industrial Court's decision finding that the respondent's dismissal by the applicant was without just cause and excuse, and ordering the applicant to pay the respondent backwages and compensation *in lieu* of reinstatement. The respondent, then aged 53, had commenced employment with the applicant in 1988 as a senior highway engineer. The applicant later published a staff handbook stating that the compulsory retirement age for all permanent employees, of whom the respondent was one, was 55 years. The applicant did not implement any 55-year compulsory retirement age policy until December 1997. On 17 December 1997, the applicant issued a memorandum to its staff stating that the board of directors had decided to implement a retirement policy for all permanent employees with the retirement age being 55 years. Thus, the company retired the respondent from service with three months' notice, alleging that the respondent had notice of the retirement age from the staff handbook.

The learned chairman held: (i) that the applicant could not rely on the respondent's knowledge of the contents of the staff handbook because the imposition of the 55-year retirement age was not done by the staff handbook but by the board of directors through the memorandum dated 17 December 1997; (ii) that the company had not proved the allegation of the claimant's poor performance; and (iii) that the company's contention that sufficient notice had been given to the claimant was irrelevant since a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse, would still be a dismissal without just cause or excuse. The applicant averred that these were perverse findings that no person or tribunal would have made in the circumstances, and it also criticised the award of damages by the learned chairman.

Held:

[1] In regard to (i), the fact that the policy as to the retirement age was not implemented upon publication of the staff handbook, coupled with the terms of the memorandum dated 17 December, provided a basis for finding that the retirement age was imposed by the board of directors through the memorandum and not by the staff handbook. Furthermore, the facts indicated that there was really no evidence that the respondent actually knew the contents of the staff handbook or that he had made claims for benefits pursuant to it. (p 325 e-h)

[2] In respect of (ii), it was a statement of law based on the fact that the applicant had failed to establish the poor performance of the claimant. In any case, the overriding point was that the respondent was not dismissed due to his unsatisfactory performance. (p 326 d)

[2a] With regard to (iii), it was a correct statement of law. Besides, the applicant terminated the respondent's employment on the basis of the policy as to the age of retirement and not on the basis that it could terminate the respondent's employment for no reason whatsoever as long as it gave three months' notice. (p 326 g)

[3] There was no reason that the learned chairman was not entitled to make such orders of payment *ie*, backwages for 24 months and compensation *in lieu* of reinstatement of one month's salary for every completed year of service, even if she had considered public interest, its financial implications and its effects on the national economy and related industries. (p 326 h)

[4] In summary, on the application for leave, it had not been shown that the learned chairman had, *prima facie*, erred in law or in fact, and had acted in excess of, or without, jurisdiction. (p 327 a)

[Application dismissed.]

For the applicants - P Paramalingam; M/s Krish Maniam & Co
For the respondent - P Kuppusamy; M/s P Kuppusamy & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad J:

This was an application by the applicant company, made *ex parte*, for leave to apply for an order of *certiorari* to quash the decision of the Industrial Court in Award No. 541 of 2000 dated 10 October 2000 and for ancillary orders. The Industrial Court had found that the applicants' dismissal of the respondent was without just cause and excuse and had ordered the applicants to pay the respondent back wages and compensation *in lieu* of reinstatement.

The respondent commenced employment with the applicants on 1 December 1988 as Senior Highway Engineer, having accepted the applicants' offer of that position. At that time the respondent was aged 53 and the applicants knew it, but the terms and conditions of the offer did not state the retirement age of the respondent.

In 1993 or 1994 the applicants embarked on an exercise to obtain an ISO certification. For that purpose they had to prepare a Staff Handbook. In cross-examination in the Industrial Court the Chief Executive Officer of the applicants said that they obtained the certification – MS-ISO 9001 certification – in 1995. The Staff Handbook was published later, in June 1996. The Staff Handbook, in its introduction, says that its purpose "is to provide information which may be useful to the staff and to facilitate them in obtaining information in their day to day activities" and that it "brings together information on the general policies of the organisation and its set up". Section Two of the Staff Handbook is headed "Policies of the Organisation". Paragraph 2.1.9 of that section states that the compulsory retirement age for all permanent employees, of whom the respondent was one, is 55 years. When the Staff Handbook was published the respondent was aged 61.

The applicants did not implement any 55-year compulsory retirement age policy until December 1997. On 17 December 1997 they issued a memorandum to all staff. It said: "The Board of Directors have decided to implement a retirement policy for all permanent employees ...

The compulsory retirement age shall be 55 years with immediate effect". It also said: "Accordingly, by virtue of this circular, the terms and conditions of employment of each employee shall be deemed to include the provisions relating to the retirement age". It is to be noted that according to the memorandum the retirement policy was a decision of the board of directors and not a policy that had been laid down in the Staff Handbook.

This was soon followed by a letter to the respondent and others dated 19 December 1997 that, after referring to the memorandum of 17 December and "the subsequent discussion with you on the same subject", said as follows:

> In view of the fact that you have exceeded the retirement age of 55 years and as per our discussion and mutual agreement, we hereby give you three months' notice effective 1st January 1998 retiring you from the service of the company on 31st March 1998.

It is to be noted that the applicants alleged in the letter that the respondent's retirement was by "mutual agreement". However, the letter had at its foot the statement "I agree to and accept the above" for the respondent to sign. The respondent did not sign the statement.

In the Industrial Court it was the respondent's case that the termination of his employment on the ground that he had exceeded the age of 55 was without just cause and excuse and was therefore a serious breach of contract because when he was taken in employment there was no term as to his retirement at 55 and he had not consented to the subsequent imposition by the memorandum of 17 December of the retirement age of 55.

From the applicants' statement in reply in the Industrial Court it appeared to me that their principal answer to the respondent's case was not that the respondent had expressly agreed to the memorandum of 17 December. The principal answer originally was that the respondent had impliedly agreed to retirement at 55 because in a discussion about it that the management had with the employees affected the respondent had remained silent. As to that, the applicants' Human Resource Manager said in cross-examination that the memorandum had been issued without discussion with employees and in examination-in-chief that the discussion took place between 17 December and 19 December, the date of the termination letter. The discussion was, therefore, after the memorandum was issued, that is, after the board of directors had decided to implement the 55-year retirement policy. As such, there was, in my opinion, no justification in implying the respondent's consent to the policy from his silence in the discussion.

In the course of the hearing in the Industrial Court, the applicants' statement in reply was amended to include another principal answer to the respondent's case, which was that the Staff Handbook had clearly laid down the retirement age of 55 and that the respondent had notice of it. Apparently the applicants had attempted to show in evidence that the respondent had claimed for and was granted certain benefits that were provided for in the Staff Handbook. The

idea, I thought, was to show that by claiming those benefits the respondent not only had notice of the contents of the Staff Handbook, including the term as to the retirement age, but also that he had consented to the contents because he not only did not object to them but had instead claimed certain benefits provided for in them.

The learned Chairman of the Industrial Court dealt with this aspect of the case in a passage in her award that was quoted in para. 13 of the applicants' affidavit in support of their application for leave. I would summarize the gist of the learned Chairman's findings, as I understand them, as follows. The applicants could not rely on the respondent's knowledge of the contents of the Staff Handbook because the imposition of the 55-year retirement age was not done by the Staff Handbook but by the board of directors through the memorandum of 17 December 1997. In any case, there was no evidence that the respondent had knowledge of the contents of the Staff Handbook and there was no evidence that the respondent, when making claims for the benefits, made them pursuant to the Staff Handbook.

In seeking leave, the applicants said that in making those findings the learned Chairman had acted in excess of or without jurisdiction because, *inter alia*, they were perverse findings that no person or tribunal would have made in the circumstances.

It was clear to me that the learned Chairman had a basis for making those findings. The fact that the policy as to the retirement age was not implemented upon the publication of the Staff Handbook, coupled with the terms of the memorandum of 17 December, provided a basis for finding that the retirement age was imposed by the board of directors through the memorandum and not by the Staff Handbook. As to knowledge of the contents of the Staff Handbook, the evidence of the applicants' Chief Executive Officer in the Industrial Court was that when it was being prepared the respondent was not consulted. After it was prepared, copies were not given to each employee. Only heads of departments were given a copy. It was only assumed that employees would have been informed of its contents by their heads of departments. There was really no evidence that the respondent actually knew of its contents. As to the claims for benefits, it is true that there was no evidence that the respondent made those claims pursuant to the Staff Handbook. It was only assumed that because he had made claims for benefits provided for in the Staff Handbook, he was aware that he made them pursuant to it. In this connection I noted that the respondent was not cross-examined as to this.

Another passage in the learned Chairman's award was criticized in para. 15 of the applicants' affidavit as being, *inter alia*, so perverse that no other person or tribunal would have made it. The passage is as follows:

> The Company also raised the issue of the Claimant's productivity at work since he had taken much medical leave due to his health problems. If this was an allegation of poor performance against the Claimant it has not been made clear to the Court. In any event the Company has failed to establish that (i) the Claimant was issued with a warning of poor performance, (ii) he was accorded sufficient opportunity to improve but (iii) notwithstanding the same he failed to improve his performance, in order to justify dismissal on the ground of unsatisfactory performance.

It is a statement of law based on the fact that the applicants failed to establish those three things. It was a fact that the applicants failed to establish those three things. As to the statement of law, I was of opinion that it was correct. In any case, the overriding point was that the respondent was not dismissed for unsatisfactory performance. The applicant terminated his services on grounds of the policy as to the age of retirement.

Paragraph 16 of the said affidavit criticized on the same basis the following passage in the award:

> As for the Company's contention that sufficient notice had been riven to the Claimant the length of a notice of termination is irrelevant since a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse and on the workman's representations under the Industrial Relations Act 1967 the Industrial Court may award reinstatement or compensation *in lieu* of reinstatement.

I was of opinion that it was a correct statement of law. In any case, the applicants, by their letter of 19 December 1997, terminated the respondent's employment on the basis of the policy as to age of retirement and not on the basis that they could terminate the respondent's employment for no reason whatsoever so long as they gave three months' notice.

Finding that the respondent had been dismissed without just cause and excuse, the learned Chairman awarded backwages for 24 months and compensation *in lieu* of reinstatement of one month's salary for every completed year of service. Paragraph 17 of the applicants' said affidavit criticized the award on the same basis and also for failing to consider public interest, its financial implications and also its effect on the national economy and the related industry. I was unable to see that the learned Chairman was not entitled to make such orders of payment even if she had considered those matters.

To summarize, on the application for leave it had not been shown that *prima facie* the learned Chairman had erred in law or in fact and had acted in excess of or without jurisdiction. I therefore dismissed the application.